Nos. 76-1371 and 76-1400

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEABOARD COAST LINE RAILROAD COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Page

Cases—continued:

Statutes and regulations:

Page

Statutes and regulations—continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1371

SEABOARD COAST LINE RAILROAD COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

No. 76-1400

SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 53a-64a)[1] is reported at 539 F. 2d 386. The decision of the Occupational Safety and Health Review Commission in

---

[1]Unless otherwise indicated, all "Pet. App." references are to the appendix in No. 76-1400.

No. 76-1371 (Pet. No. 76-1371, App. 19a) is reported at 1974-1975 CCH OSHD para. 19,073. The decision of the Commission in No. 75-1400 (Pet. App. 24a-51a) is reported at 13 OSAHRC 258.

JURISDICTION

The judgment of the court of appeals (Pet. No. 76-1371, App. 12a; Pet. App. 65a-66a) was entered September 22, 1976. Petitions for rehearing (Pet. No. 76-1371, App. 13a; Pet. App. 67a) were denied on January 10, 1977. The petition for a writ of certiorari in No. 76-1371 was filed April 6, 1977. The petition in No. 76-1400 was filed April 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), exempts the railroad industry from compliance with the safety and health regulations promulgated under the Act because another federal agency has issued some safety and health rules affecting that industry.

STATEMENT

1. The Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions * * *." 29 U.S.C. 651. See generally *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, No. 75-746, decided March 23, 1977; *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1259 (C.A. 4); *National Realty and Construction Co.* v. *Occupational Safety and Health Review Commission*, 489 F. 2d 1257, 1260-1261 (C.A.D.C.). The Act imposes upon all employers engaged in a business affecting interstate commerce the

obligation to furnish "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" and to "comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. 654(a)(1) and (2). The sole exception to this comprehensive regulatory scheme is Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), which provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies • • • exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

2. Petitioners Seaboard Coast Line Railroad Company ("Seaboard") and Southern Pacific Transportation Company ("Southern Pacific") operate interstate railroad systems. As part of its system, petitioner Seaboard operates a rail repair shop in Savannah, Georgia (Pet. App. 54a), and, as part of its system, petitioner Southern Pacific operates a diesel service shop in Houston, Texas (*id.* at 2a, 6a). After a compliance officer of the Occupational Safety and Health Administration of the Department of Labor had inspected these facilities, the Secretary, on August 2, 1972, and April 2, 1973, respectively, cited petitioner Southern Pacific for four "nonserious" violations, and petitioner Seaboard for one "nonserious" violation, of safety and health regulations promulgated under the Act.[2] Minor penalties were proposed to be

---

[2]Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), provides that every employer engaged in a business affecting interstate commerce "shall comply with occupational safety and health standards promulgated under this Act." Section 17(k) of the Act, 29 U.S.C. 666(j), pertinently provides that a serious violation is one which creates "a substantial probability that death or serious physical harm

assessed against petitioner Southern Pacific (*id.* at 2a-3a). At the time of these citations and the subsequent Commission decisions, the Federal Railroad Administration of the Department of Transportation (FRA) possessed statutory authority to regulate at least some of the conditions affecting employee safety at the Savannah and Houston worksites.[3] It had not exercised that authority, however, and no substantive occupational safety and health regulations of FRA or any other agency of the Department of Transportation applied there (*id.* at 27a-28a, 56a).

Both petitioners timely contested the citations. Petitioner Southern Pacific conceded noncompliance with the cited standards but asserted that, since FRA had regulated some aspects of employee safety in the railroad industry, the entire industry was exempt pursuant to Section 4(b)(1) from any regulation under the Act (Pet. App. 25a). An administrative law judge of the Occupational Safety and Health Review Commission rejected this contention, concluding that, in light of Congress' expressed desire for uniform nationwide safety protection so far as possible, Section 4(b)(1) does not exempt industries that are regulated by other federal agencies

---

could result" from its presence. Section 17(c), 29 U.S.C. 666(c), defines a nonserious violation as one which is "not • • • serious."

Southern Pacific was cited for violations related to the operation of cranes (29 C.F.R. 1910.179(b)(1) and (j)(2)(iii)) and for failing to display a poster informing employees of the Act (29 C.F.R. 1903.2 (a)) (Pet. 4). It was also cited for a recordkeeping violation, which the Commission vacated and which was not before the court of appeals (see Pet. App. 23a, 29-30a). Seaboard was cited for failure to provide exhaust ventilation for two machines in use at its repair shop (Pet. No. 76-1371, App. 14a).

[3]See Section 202(a) of the Federal Railroad Safety Act of 1970, 84 Stat. 971, 45 U.S.C. 431(a).

when those agencies have not acted to protect employees within the industry (Pet. App. 1a-23a). The Review Commission affirmed, one member dissenting (*id.* at 24a-51a).

Petitioner Seaboard, without conceding noncompliance, also asserted that the railroad industry was exempt from regulation by virtue of Section 4(b)(1). An administrative law judge of the Commission agreed with Seaboard and dismissed the Secretary's complaint for want of jurisdiction (Pet. No. 76-1371, App. 14a-18a). The Review Commission, acting on the authority of its prior decision in Southern Pacific's case, reversed and remanded for a hearing on the merits (*id.* at 19a).

The court of appeals consolidated Southern Pacific's and Seaboard's petitions for review and unanimously upheld the Commission's decisions (Pet. App. 53a-64a).[4] The court rejected the railroads' argument that the term "working conditions of employees" in Section 4(b)(1) is equivalent to "industries" (*id.* at 56a), and it ruled that the FRA's promulgation of regulations for specific items of railroad equipment and development of an accident-reporting and record-keeping system "did not displace

---

[4]A petition filed by Union Pacific Railroad Company in the United States Court of Appeals for the Eighth Circuit, seeking review of another Commission decision holding that the railroad industry is not exempt from regulation under the Act, was transferred to the Fifth Circuit for consolidation with petitioners' cases (Pet. App. 54a). Union Pacific has not sought certiorari from the decision below.

In the court of appeals the Secretary moved to dismiss Seaboard's petition on the ground that the merits of the Secretary's complaint against Seaboard had not yet been adjudicated. While the petition was pending, however, an administrative law judge ruled that Seaboard had committed the violation alleged, and in those circumstances the court of appeals declined to pass upon the jurisdictional issue posed by the Secretary's motion (*id.* at 54a n. 1).

the general OSHA regulatory scheme" (*id.* at 57a). The court observed that an earlier version of the Act, which favored the railroads' arguments concerning industry-wide exemption, had been rejected by Congress (*id.* at 58a-59a) and concluded that, in light of the Act's goal of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651),

> it seems unlikely that Congress would wish the ubiquitous OSHA regulations in question here to be displaced by the FRA's limited operating equipment and accident-reporting activity. Placed in this context, the railroads' interpretation of section 4(b)(1) as an industry-wide exemption becomes an assertion that a requirement of accident reporting displaces substantive standards designed to prevent accidents—an assertion inconsistent with such an announced statutory purpose. [Pet. App. 59a-60a.]

The court of appeals stated that the term "working conditions" in Section 4(b)(1) "embraces both 'surroundings,' such as the general problem of the use of toxic liquids, and physical 'hazards,' which can be expressed as a location (maintenance shop), a category (machinery), or a specific item (furnace)" (*id.* at 60a), and that FRA regulations "directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard'—displaces OSHA coverage of that working condition" (*ibid.*). In any given case, said the court (*id.* at 61a), whether the FRA regulation preempted the area covered was to be determined "by the FRA's intent" (*ibid.*); regulatory duplication "may be avoided or greatly minimized by a clear statement, in each instance of displacing regulation, of the FRA's position on * * * preexisting OSHA regulations which it seeks to oust" (*id.* at 61a-62a).

Finally, the court rejected petitioners' claim that an advance notice of proposed rulemaking, which had been published by FRA four months after the Commission's decisions and which invited comment on the agency's intent to propose more comprehensive safety rules,[5] was an "exercise" of authority sufficient to exempt petitioners under Section 4(b)(1), concluding that Congress could not "have meant for *existing and operative OSHA regulations* to be displaced without more conclusive FRA action than a mere statement of intent to do something in the future" (*id.* at 63a) (emphasis in original).

ARGUMENT

Three courts of appeals have now rejected the contention that either the Federal Railroad Administration's power to regulate the safety conditions of the railroad industry, or the partial exercise of those powers, wholly exempts that industry from regulation under the Occupational Safety and Health Act of 1970. See, in addition to the decision below, *Southern Railway Company* v. *Occupational Safety and Health Review Commission*, 539 F. 2d 335 (C.A. 4), certiorari denied, December 6, 1976 (No. 76-100); *Baltimore and Ohio Railroad Company* v. *Occupational Safety and Health Review Commission*, C.A.D.C., No. 75-2163, decided December 30, 1976. Those decisions are correct and further review by this Court is unnecessary.

1. Petitioners contend (Pet. No. 76-1371, pp. 11-20; Pet. No. 76-1400, pp. 12-18) that Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. 653(b)(1), exempts the railroad industry from any regulation under the Act because another federal agency (the Federal

---

[5] 40 Fed. Reg. 10693.

Railroad Administration) has authority to regulate job-related hazards in that industry. The court of appeals correctly rejected this result, since it is contrary to the legislative design of the Act and would leave a gaping hole in the statutory protection from workplace health and safety hazards that Congress sought to insure for the nation's employees. Furthermore, the decision below not only is consistent with the other two appellate rulings on the scope of Section 4(b)(1) as applied to the railroad industry (see above),[6] but also is in accord with this Court's repeated pronouncements that exemptions from remedial legislation must be narrowly construed (see, *e.g.*, *Peyton* v. *Rowe*, 391 U.S. 54, 65; *Phillips Company* v. *Walling*, 324 U.S. 490, 493), and that the interpretation given a statute by the agency charged with its administration is entitled to great deference (see, *e.g.*, *National Labor Relations Board* v. *Boeing Company*, 412 U.S. 67, 74-75; *Udall* v. *Tallman*, 380 U.S. 1, 16).[7]

---

[6]See also *Organized Migrants in Community Action* v. *Brennan*, 520 F. 2d 1161, 1166 (C.A.D.C.), where the court considered it "clear on its face" that Section 4(b)(1) does not exempt entire industries and that withdrawal of the Secretary's jurisdiction to enforce safety and health standards for particular working conditions is dependent upon the actual exercise of statutory authority over those conditions by another federal agency.

[7]The colloquy between Representative Perkins, Daniels and Erlenborn (Pet. No. 76-1371, pp. 17-18; Pet. No. 76-1400, pp. 12-14) does not require a different result. As the court of appeals (Pet. App. 58a-59a) indicated, that discussion concerned an earlier House version of Section 4(b)(1) that arguably would have exempted entire industries by divesting the Secretary of authority over "working conditions of employees with respect to *whom* any federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Leg. Hist. 843, 876, 1109 (emphasis added). ("Leg. Hist." refers to the one-volume Committee print entitled Legislative History of the Occupational Safety and Health Act of 1970, Senate Subcommittee of the Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. (1971)). The House version was

2. We disagree with petitioners' claim (Pet. No. 76-1371, pp. 6-11; Pet. No. 76-1400, pp. 6-9) that the decision below conflicts with the Fourth Circuit's decision in *Southern Railway Company, supra*, over the definition of "working condition" in Section 4(b)(1). While the court below indicated that its analysis "follows a slightly different track" (Pet. App. 55a-56a) from the analysis of the Fourth Circuit, the two decisions are compatible. In construing the term "working conditions," both courts relied on this Court's definition of that term (as it appears in the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1)) in *Corning Glass Works* v. *Brennan*, 417 U.S. 188, and both courts concluded that the term means both the "surroundings" and the "hazards" of the worksite (539 F. 2d at 339; Pet. App. 57a). The Fourth Circuit then used the catchall phrase "environmental area" to describe the "working conditions" in which "an employee customarily goes about his daily tasks," and stated that FRA safety and health standards for such an area would preempt regulations under OSHA (539 F. 2d at 339). The court below stated (Pet. App. 60a) that "any FRA exercise directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard'—displaces OSHA coverage of that working condition." While neither court's approach will necessarily resolve every potential issue under Section 4(b)(1), they are plainly not inconsistent with each other. Indeed, the District of Columbia Circuit in *Baltimore and Ohio Railroad Company, supra*, rejecting arguments in favor of industry-wide exemption similar to those made by

---

rejected in favor of the present Senate language by a Conference Committee chaired by Representative Perkins, who characterized the change as one of several resolving "a major difference in the two bills in the treatment of the proposed effect on other preexisting health and safety statutes." Leg. Hist. 1204. See also *id.* at 1185-1186.

petitioners, relied upon both the Fourth Circuit's decision and the decision below without even mentioning the "slightly different track[s]" followed in those cases, indicating its belief that the difference in approach between the two cases is insignificant.[8]

3. Contrary to petitioner Southern's contention (Pet. No. 76-1400, p. 16), the court of appeals correctly determined that FRA's advance notice of proposed rulemaking did not exempt railroad employees from the protection of the Act. As the court noted (Pet. App. 62a), "this speculative announcement adds nothing to previous FRA activity and is not a sufficiently concrete 'exercise' to preempt the otherwise applicable regulations." Moreover, the issue before the court was the scope of the Secretary's regulatory powers at the time the violations occurred, not the effect of subsequent FRA actions on which the Commission had no opportunity to pass. At the time of the court and Commission decisions, FRA admittedly had

---

[8]Petitioners raise the spectre of a possible intercircuit conflict arising out of ongoing litigation concerning Section 4(b)(1) (Pet. No. 76-1371, p. 7-8 n. 9; Pet. No. 76-1400, pp. 6-7 n. 7). The Seventh Circuit case cited by petitioners, however—*Chicago, M., St. P. & P. Ry.* v. *Occupational Safety and Health Review Commission* (No. 75-2112)—has been dismissed for want of prosecution, August 10, 1976, and the Eighth Circuit case—*Burlington Northern Railroad* v. *Occupational Safety and Health Review Commission* (No. 75-1943)—has been transferred to the Fifth Circuit, where it will presumably be governed by the decision below. The Fourth Circuit case—*Penn Central* v. *Occupational Safety and Health Review Commission* (No. 75-1102, CCH 1975-1976 OSHD para. 20,470, decided March 2, 1976)—has been decided by that court in accordance with its earlier decision in *Southern Railway Co., supra*. The Ninth Circuit case is still pending before that court (*Dunlop* v. *Burlington Northern Railroad, Inc.*, 395 F. Supp. 203 (D. Mont.), appeal docketed, No. 75-3184). Even if the decision in that case should depart from the otherwise uniform result reached by the other courts of appeals to have faced the issue presented here, the possibility of that happening does not warrant certiorari in this case.

not issued any regulations affecting working conditions of the types that were the subject of the citations. Thus, the question of the effect of an advance notice of rulemaking is actually not presented here.[9]

Similarly, petitioner Seaboard's objection (Pet. No. 76-1371, pp. 9-10) to the court's refusal to consider the effect of FRA's proposed "general duty" clause[10] is without merit. As the court noted in connection with its discussion of the effect of the advance notice of proposed rulemaking, "Congress obviously wanted railroad health and safety conditions to be regulated forthwith by *some* agency," and accordingly "[i]t seems unlikely that this same Congress could have meant for *existing and operative OSHA regulations* to be displaced without more conclusive FRA action than a mere statement of intent to do something in the future" (Pet. App. 63a; emphasis in original). Moreover, even a promulgated general duty clause would likely fall short of the type of exercise of FHA regulatory authority that would be necessary to displace particularized OSHA standards.[11] Finally, since the FRA "general duty"

---

[9]Representative Steiger's statement that sister-agency "action * * * at the formative stage of regulations or enforcement" would trigger Section 4(b)(1) (Pet. No. 76-1400, p. 16) is accordingly irrelevant to this case. Moreover that remark was addressed to the House version of Section 4(b)(1), which was ultimately rejected. See n. 7, *supra;* Leg. Hist. 997.

[10]41 Fed. Reg. 29153.

[11]None of the other "publications" in the Federal Register cited by petitioner Seaboard (Pet. No. 75-1371, p. 9 n. 12) supports its argument that FRA activity has ousted the OSHA regulations at issue here. To begin with, the FRA activity referred to occurred subsequent to the violations for which Seaboard was cited, and therefore can have no impact on the Secretary's authority to cite Seaboard for those violations at the time they were committed. Beyond that, the publications cited deal with such topics as amendments to the existing rules relating to rolling stock (42 Fed. Reg. 2321), rules relating to civil penalties (41 Fed. Reg. 50701, 30649), and proposed rulemaking (*e.g.*, 41 Fed. Reg. 48126, 51429): none of this activity by FRA constitutes promulgation of substantive standards even remotely related to the conditions covered by the OSHA regulations at issue here.

clause has only been proposed, it does not amount to a "changed circumstance" that would alter or require reconsideration of the decision below, and accordingly petitioner Seaboard's reliance on *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (Pet. No. 76-1381, p. 9) is inapposite.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.